

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO.Z-1023982 AND ALL
OTHER SEAMAN DOCUMENTS

Issued to: JAMES H. CHILDRESS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1552

JAMES H. CHILDRESS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 9 November 1965, an Examiner of the United States Coast Guard at Galveston, Texas, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a utilityman on board the United States SS DUVAL under authority of the document above described, on or about 3 October 1965, Appellant wrongfully assaulted and battered one Charles W. Lewis, a fellow crew member, with a paring knife, and created a disturbance aboard the vessel.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the Master of the vessel and certain documents.

In defense, Appellant offered in evidence the testimony of four witnesses and testified in his own behalf. Stipulations were entered as to the testimony of two other defense witnesses.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 9 November 1965. Appeal was timely filed on 29 November 1965.

FINDINGS OF FACT

From 21 July 1965 to 3 November 1965, Appellant was serving under authority of his U.S. Merchant Mariner's Document as utilityman aboard the SS DUVAL, a merchant vessel of the United States.

In October of 1963, Appellant had suffered a fall which caused a severe low-back injury. Because of this he had transferred from engine department work to less physically arduous Steward's department work.

Early in the course of the voyage in question one Charles W. Lewis, and acting oiler, had battered one Bosco, an AB seaman, causing many bruises and inflicting a three inch cut on his head with a can. Shortly thereafter Lewis communicated a threat to Appellant that he would "put knots in his head" just as he had done to Boscoe. When the Master was advised of this he warned Lewis that he would put him in irons if he molested Appellant.

On two occasions, it was reported to the Master that Lewis had "beat up" one Bob High, a crewmember.

On several occasions after his first encounter with Appellant Lewis threatened him with bodily harm and directed abusive language to him. Once Lewis was heard to say that he planned to throw Appellant over the side.

On the morning of 3 October 1965, Lewis approached Appellant, who was at work in the pantry and commenced to choke him. The appearance of the chief cook with a knife in his hand caused Lewis to desist and depart.

That evening, Lewis again approached Appellant, who was working alone in the pantry, and spat in his face. Appellant has a paring knife in his hand and reacted quickly by stabbing Lewis once in the abdomen.

The Master placed Appellant in irons until Lewis was removed from ship the next morning. He took this action to protect both men from further harm.

BASES OF APPEAL

It is urged that the findings and order of the Examiner should be set aside because:

- (1) Appellant was denied due process in that he was misled as to the nature of the charges and of the proceeding, and was induced to waive his right to counsel, by the erroneous advice of the Master of the SS DUVAL that the proceedings would be a mere formality from which no adverse results could flow:
- (2) The record fails to show that the charges were served upon Appellant in accordance with the applicable regulations; and
- (3) Appellant acted in legitimate self-defense.

APPEARANCE: Simon, Wicker and Wiedemann of New Orleans, Louisiana, by Lawrence D.

OPINION

The first two grounds for appeal may be quickly disposed of. The record shows that Appellant was adequately advised of his rights and of the nature and possible consequences of the hearing by both the Investigating Officer and the Examiner. The Investigating Officer had specifically advised Appellant to obtain counsel because of the serious nature of the charge. What other advice Appellant may have received from persons not parties to the proceedings do not invalidate the actions taken. Further the record shows (R-4, R-5) substantial compliance with the regulations governing service of charges and notice of hearing. Appellant was afforded the opportunity to, and did, call several witnesses in his defense, and he did, through their evidence and his own testimony squarely and clearly raise the issue of self-defense.

No prejudice to his rights appears in his conscious waiver of counsel.

The question of self-defense is, however, a serious matter.

The victim of the stabbing, Charles Lewis, did not testify at the hearing either in person or by deposition. His self-serving declaration, incorporated in the master's form report of injury, that Appellant had attacked him without provocation is of little if any probative value, and in light of all the evidence must be rejected.

There seem little doubt, on the whole record, that the stabbing came as the result of aggressive action by Lewis. The only question is whether the means of defense were legitimate.

In deciding this issue against Appellant the Examiner invoked the "retreat to the wall" doctrine. This doctrine, generally applied in cases of homicide, has outgrown its pristine literal bounds. Brown v. United States, 256 U.S. 335.

In cases of assault and battery when self-defense is in issue the test is whether under all the circumstances the use of a weapon by the party threatened by an aggressor is reasonable.

Here, Appellant was within the limited confines of the ship's pantry where he had a right to be. He was approached by a man with a reputation aboard the vessel for violence, who had threatened him on numerous occasions, and who had, earlier that same day, assaulted him by choking him, from which the assailant desisted only when confronted by a third party armed with a knife.

The Examiner found as a fact that Appellant "did not know what Mr. Lewis at that time might do to him." Unnoted was Appellant's testimony that he was in constant fear of Lewis and that he used a weapon only because his back condition handicapped him in defending himself.

Under the circumstances described in this record and upon the substantial evidence presented,

I am not persuaded that Appellant's instinctive reaction to the menace presented by his persistent tormentor was unreasonable.

The Order of the Examiner is set aside, the findings are reversed, and the Charge is dismissed.

ORDER

The order of the Examiner dated at Galveston, Texas, on 9 November 1965, is VACATED. The FINDINGS are REVERSED, and the charges DISMISSED.

E.J. Roland
Admiral U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 18th day of May 1966.

Assault (including battery)

aggressor
dangerous weapon, when permitted
fear of injury
force permitted
justification for, presence of
requirement of retreat

Counsel

waiver of right to

Defenses

assault feared
fear of bodily harm

Hearings

possible results of, explained
right to counsel, explained

Self-Defense

assault
excessive force, absence of

reasonability of means
retreat, obligation to